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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 421

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,

versus

MADGE REED WATKINS, INDIVIDUALLY AND AS NATURAL TUTRIX OF HER MINOR CHILD, RICHARD WESLEY WATKINS,
Respondent.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

May It Please the Court:

Your respondent, Madge Reed Watkins, individually, and as natural tutrix of her minor child, Richard Wesley Watkins, respectfully prays that this Court deny the application herein for a writ of certiorari to review the decision of the United States Court of Appeals for the

Fifth Circuit rendered on April 12, 1957, rehearing denied June 14, 1957, affirming a judgment of the United States District Court for the Eastern District of Louisiana.

STATEMENT OF THE CASE.

The statement of the case by petitioner is correct insofar as the proceedings in the lower courts are concerned.

However, respondent does not agree with the stated findings of the Court of Appeals and respondent will present these findings in argument to follow.

Reasons Relied on For Denying the Writ.

The Court of Appeals held that:

I.

There was sufficient evidence to allow the jury to conclude that, under applicable Louisiana principles the Railroad had failed to exercise due care by earlier blowing effective warning signals, reducing speed, increasing vigil, or the like, because of the special hazards and dangers of that crossing under those known conditions. (Opinion, pp. 2, 3; R. pp. 269, 270).

This finding conforms to Louisiana jurisprudence.

Guidry v. T. & N. O. Ry. Co., 20 So. (2d) 637;
Guidry v. T. & N. O. Ry. Co., 56 So. (2d) 611;
Squyres v. Baldwin, 185 So. 14;
Arnold v. Illinois Central Railroad Co., 32 So. (2d) 76;
Arnold v. Illinois Central Railroad Co., 33 So. (2d) 98.

II.

The evidence allowed the jury to conclude that the decedent was not guilty of contributory negligence. (Opinion, pp. 4, 5, 6, 7, 8; R. pp. 271, 272, 273, 274 and 275).

Again, this finding follows the jurisprudence of Louisiana.

In *Aymond v. Western Union Telegraph Co., et al.*, 151 La. 184, 91 So. 671, the Supreme Court of Louisiana said:

> "For the rest, we do not know whether the boy looked or listened, or whether looking or listening would have done any good; but since the burden of proof as to contributory negligence is on defendant, it is a presumption of law that he did look and listen; and since the love of life is instinctive, especially in youth, it is also a presumption of fact that the boy gave some care to his own safety. Hence, since neither the evidence of the defendant nor that of plaintiff shows contributory negligence in the boy, no such contributory negligence will be presumed."

The appellate courts of Louisiana have recognized and followed this doctrine.

In *Kern v. Knight*, 127 So. 133, the Court said:

> "Since the burden of showing contributory negligence is on the defendants, the law presumes the instinct of self preservation in the deceased

caused him to look and listen, and to exercise due care under the circumstances, a rule absolutely in contravention of the one contended for by the defendants. Aymond v. Western Union Tel. Co., 151 La. 184, 91 So. 671."

In accord:

Boykin v. Plauche, 168 So. 741;
Tassin v. Downs, 190 So. 232.

And in *Henwood v. Wallace*, 159 F. (2d) 263, Cert. Denied 67 S. Ct. 1310, 33 U. S. 820, 91 L. Ed. 1837, the U. S. Court of Appeals for the Fifth Circuit recognized the State rule and said:

"The decisive question before us is whether the appellant was guilty of contributory negligence as a matter of law. The burden of proving that he was so contributorily negligent was on the defendant. The verdict of the jury necessarily implies a finding that the defendant failed to meet this burden. Also implicit in the verdict is a finding that, as the plaintiff approached the crossing the train was not visible to him while there was still time to stop."

III.

That the standing train rule was inapplicable to the facts and circumstances surrounding the accident. (Opinion, pp. 7, 8; R. pp. 274, 275).

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the application for a writ of certiorari be denied.

Respectfully submitted,

THOMPSON L. CLARKE,
St. Joseph, Louisiana;
C. WILLIAM BRADLEY,
Norco, Louisiana,
Attorneys for Respondent.

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16294

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Appellant,

versus

MADGE REED WATKINS, Individually and as Natural Tutrix of her Minor Child, RICHARD WESLEY WATKINS,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 12, 1957.)

Before RIVES, TUTTLE and BROWN, Circuit Judges.

BROWN, Circuit Judge: As though almost at hand were the day of the juridical Univac, in which data on weather, distance, speed, time, maxima-minima variables, favorable and unfavorable inferences are fed into its insatiable maw there to be stored, sorted, weighted, com-

pared and digested, the Railroad with great earnestness insists that mechanically there can be no liability for the crossing death of Opal Watkins because the tractor hit the train, not the train hit the tractor. The jury with its cruder abacus delivered a contrary result.

The accident took place in the early morning hours at the crossing of a private road over the railroad track as it runs east and west through the Green & Gold Plantation for whom Watkins worked. The passenger liner was eastbound, and Watkins, on the north side of the track, was driving a large, cumbersome diesel tractor pulling an implement on or adjacent to the crossing road in the course of going to the plantation fields south of the track. There was, to the Railroad's knowledge, a considerable movement of employees and heavy farm equipment over this crossing every morning and during the day. While both were in motion the tractor, somewhere near its front end, collided with some part of the train on the north side of the crossing killing Watkins immediately.

Testing this, as we must with all inferences most favorable to the jury verdict, there was ample, believable evidence which the jury could and presumably did credit as to other circumstances. There was heavy fog reducing visibility to a range between 50 and 100 feet, and the noise of the large, heavy duty diesel tractor was sufficient to offset or drown out the rumbling noise of an oncoming train. The angle is disputed, but the tractor's course ranged toward the southeast so that train and tractor were converging with the train approaching behind Watkin's back. This crack passenger train, running

10 minutes late, was making 65 miles per hour or approximately 96 feet per second. The whistle for this private, but known, crossing was not blown until after the impact and when the engine was right on, or just beyond, the crossing. And in the lookout maintained by him, the engineer never saw the tractor, although a wide view of the right of way and crossing road was unobstructed and, on any of the Railroad's theoretical hypothesis, the tractor was not farther than 20 to 30 feet from the track as the train approached and went through the crossing.

This, with evidence that the plantation operators had for some time warned the Railroad's management of dangers of this crossing as this daily movement of slow, awkward, unmanageable farm equipment made its daily trek to and from the work fields frequently in fog and other circumstances of reduced visibility, was sufficient to allow the jury to conclude that, under applicable Louisiana principles,[1] the Railroad had failed to exercise due care by earlier blowing effective warning signals, reducing speed, increasing vigil, or the like, because of the special hazards and dangers of that crossing under those known conditions.

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[1] **Kansas City Southern Ry. Co. v. Wiggins**, 5 Cir., 234 F. (2d) 128, 131. **Guidry v. T. & N. O. Ry Co.**, La. Ct. App., 20 So. (2d) 637, 638, see second appeal 56 So. (2d) 611, approved, from 22 Ruling Case Law, Railroad, §233, pp. 1004, 1005:

> "• • • A railroad is bound to exercise reasonable care in the operation of its trains and to avoid injury to persons and animals at all crossings, private as well as public; and if by reason of peculiar or extraordinary circumstances surrounding a crossing and known to the trainman, prudence would require an alarm or signal to be given by an approaching train, then its omission is negligence."

Notwithstanding this ample basis for the jury's verdict, the Railroad insists that evidence otherwise favorable to the plaintiffs demonstrates either that the train was so far through the crossing that the decedent must simply have run into the side of an obvious, moving train, or, in any case, if the initial impact were near the front of the train, the tractor driver had time and distance within which to act, and his failure compels a finding of contributory negligence as a matter of law.[2]

While the evidence from photographs and car repairmen was impressive and the jury might have concluded that the initial impact was at the first point of serious damage to the third car (approximately 300 feet from the front end), this conclusion was not compelled. The construction of the tractor, the light damage to its left front wheel, radiator shell and fan blade was sufficient to permit the jury to conclude that the initial impact was nearer the front of the train and, with the weird imponderables[3] of accidents, this whipped the tractor around throwing it forceably against the car's side as it sped by.

This narrows the Railroad's attack then to inferences of time, distance and opportunity which it claims are compelled by the witness Tastet's testimony.[4] But

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[2] See, e.g., **United States Fidelity & Guaranty Co. v. McCullough**, 5 Cir., 202 F. (2d) 269, cert. den. 346 U. S. 868, 98 L. Ed. 378; **Wyche v. Brian**, 28 So. (2d) 143; **Illinois Central Railroad Co. v. Leichner**, 5 Cir., 19 F. (2d) 118.

[3] A glass water jug hanging in the cab of the tractor was undamaged.

[4] Tastet was in a truck south of the track turning from a side road into the crossing road. He had a full, but momentary, view of the track, train and tractor. When the engine entered the crossing it cut off his view of the tractor. In the moment pre-

(Continued)

this intricate analysis[5] with its fine calculations, some of which are based on assumptions which the jury did not

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[4] (Continued)

ceding that, he saw the train come out of the fog when it was 75 to 100 feet from the crossing at which time the tractor, apparently at some angle, was 15 to 20 feet from the crossing. The train and tractor kept coming on and in an instant collision occurred.

He estimated the tractor's speed at 8 to 10 miles per hour (11.7 and 14.66 feet per second, respectively) and stopping distance at this speed at 8 to 10 feet for a planned stop but "a sudden stop would even be a little bit further * * *."

[5] Reading into Tastet's estimated distance of "15 to 20 feet" the assumption that the distance, 15 or 20, was the perpendicular, north and south, from the front end of the tractor to the nearer, north, rail the Railroad on the further assumption that the tractor was approaching at a 45 degree angle constructs two right angle triangles which produce an hypotenuse of 21.2 feet and 28.5 feet, respectively.

The nature of the reasoning which the Railroad insists "reasonable men" are compelled to follow, and the choices open to Watkins as his life reached its close, is then elaborated on in the Railroad's brief:

> "If the tractor was 15 feet from and approaching the track at a 45 degree angle, * * * it would have to travel 21.2 feet to reach the crossing * * * The train being 75 feet away when it came out of the fog and travelling in excess of 65 miles per hour (therefore travelling more than 95.4 feet per second) and decedent being 15 feet away from the track travelling at the rate of 10 miles per hour (14.66 feet per second) it would take the train one second to be more than 20.4 feet past the crossing, at which time the tractor would still be 6.54 feet from the crossing. It would take the tractor 9 20ths of one second to travel the remaining 6.54 feet, during which time the train would have travelled more than 45.9 feet, or a total of more than 66.3 feet past the crossing. For every mile per hour the train exceeded 65 miles per hour, the train would travel approximately 2 feet more for the one and 9 20ths of a second it would take the tractor to reach the crossing. If the tractor was 20 feet from the track, it would have to travel 28.5 feet to reach the crossing * * * and, travelling at 8 miles per hour (11.7 feet per second) and the train 75 feet from the crossing, travelling in

(Continued)

have to make even if its reasoning process took this form, fails to reckon with several things of importance. The

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(Continued)

excess of 65 miles per hour, it would take the tractor 2.436 seconds to reach the crossing. In these 2.436 seconds, the train would have travelled 232.39 feet, less the 75 feet it was from the crossing, or the train [engine] would be 157.39 feet past the crossing. For every mile per hour the train exceeded 65 miles per hour, the train travelled 3.56 feet for the 2.436 seconds it took for the tractor to reach the crossing."

On assumption that the tractor was 15 feet, the train 100 feet from crossing, with tractor moving at 10 miles per hour:

"The tractor 15 feet away from the track would have to travel 21.2 feet to reach the crossing, which would take 1.45 seconds. During this time, the train [engine] would have travelled 141.3 feet and would therefore be more than 41 feet past the crossing."

On assumption that the tractor was 20 feet, the train 75 feet from the crossing, with tractor moving at 8 miles per hour:

"Using these figures, the tractor would take 2.436 seconds to reach the crossing, during which time the train [engine] would have travelled 232.39 feet and would therefore be 157.39 feet past the crossing when the impact occurred."

On Watkins' failure to take action:

"When the tractor was 15 feet from the track and approaching at a 45 degree angle, it would have to travel 21.2 feet to reach the crossing point • • • If Watkins had applied his brakes at that time, he could have stopped with an 11.2 foot clearance. If the tractor was 20 feet from the track, it would have to travel 28.5 feet to its point of crossing, • • • and therefore Watkins could have stopped with an 18.5 foot clearance. Obviously, if the tractor was the slightest distance more than 16 feet from the crossing, the train could have passed in absolute safety. Yet the accident occurred.

• • • Notwithstanding that, if Watkins had been alert and had seen the train when he should have, he merely had to make a 45 degree turn to the left and by placing his tractor parallel to the path of the train, the train could have passed in absolute safety. Yet, he neither stopped nor turned his vehicle."

first is that the necessity for sudden action in these fleeting moments was precipitated by the train's failure earlier to blow an audible warning signal and repeat it if necessary as the engine broke through the fog and could see, had lookout been kept, the tractor on its apparent course toward destruction. Whether with fog obscuring the track beyond 75 feet he ought to have anticipated that a train would suddenly emerge without warning, whether with fifteen feet and one second then between him and eternity Watkins ought to have stopped and had he, whether with time and distance for response and subsequent braking action, he could have stopped, whether he should have turned to the left instead of the right was the very stuff of which the ordinary prudent man is compounded.

Appealing as is the illusion of certainty, *Miss. Valley Barge Line Co. v. Indian Towing Co. Inc.*, 5 Cir., 232 F. 2d 750, ____ AMC ____, liability cannot be resolved by a mechanical formula which, with chicken-or-the-egg-inquiry, attempts to fix *who* hit *whom*. If the train suddenly, without notice, broke out of the fog so that its presence became known to Watkins as it came abreast his tractor then travelling the few remaining feet to the track, the train, in the time it takes to say the words* "one locomotive" would have moved 100 feet. And yet, on this hypothesis, the Railroad's action was not the less the cause merely by reason of the fact that the physical

* A fairly reliable rough way to judge time in seconds.

contact was from the tractor running into the train.[7] Nor does the standing train rule[8] afford an insulation from the jury verdict. The train was not standing. It was moving.[9] Indeed, it was moving at high speed and what appeared to be an open crossing to the tractor-driver within the sounding of a trump was suddenly occupied by a train which just as quickly went away. The rule is one of common sense, *Atlantic Coast Line R. Co. v. Kammerer*, 5 Cir., 239 F. 2d 115, and it cannot be applied to establish contributory negligence as a matter of law when its assertion assumes, without more, what is really in question, that is, the decedent's knowledge that a train was there, *Kansas City Southern R. Co. v. Wiggins, et al.*, 5 Cir., 234 F. 2d 128, 132.

Finally, the Railroad does not succeed in demonstrating that such palpable error has been made, such a manifest miscarriage of justice has occurred, for us to hold that the District Court abused his discretion in denying the motion for new trial because the verdict was wrong

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[7] An opposite situation is as readily supposed: a tractor is stationary or moving slowly a few feet from the crossing apparently indicating to the locomotive engineer that it will await the passing of the train when, too late in time and too close in distance, the tractor suddenly moves toward the track and the train hits it broadside. The tractor's action would be the cause even though the train hit the tractor. See, e.g., **Brown v. Louisville & Nashville R. Co.**, 5 Cir., 234 F. (2d) 204.

[8] **United States Fidelity & Guaranty Co. v. McCullough**, 5 Cir., 202 F. (2d) 269, cert. den., 346 U. S. 868, 98 L. Ed. 378; **Allen v. Texas & Pacific Ry. Co.**, 5 Cir., 195 F. (2d) 545, **DeLoach v. Louisiana & Arkansas Ry. Co.**, 5 Cir., 210 F. (2d) 921; **Donnie v. Thompson**, 9 So. (2d) 55; **Ramsey v. La. & Ark. Ry. Co.**, 70 So. (2d) 171; **Gates v. A. & L. M. R. Co.**, 180 So. 835.

[9] This disposes of the further asserted error that the Court should have given the Railroad's requested instruction: "A train across a highway constitutes a most impressive notice to drivers of motor vehicles that crossing is temporarily blocked."

even though supported by some evidence. *Commercial Credit Corporation v. Pepper*, 5 Cir., 187 F. 2d 71; *Whiteman v. Pitrie*, 5 Cir., 220 F. 2d 914; *Marsh v. Ill. Central R. Co.*, 5 Cir., 175 F. 2d 498, 500.

AFFIRMED.

TUTTLE, Circuit Judge, dissenting:

I dissent. I think there was no proof of negligence on the part of the railroad that had any causal connection with the collision, on a private road, with a tractor whose driver crossed the track daily and who was under standing instructions from his employer to approach the track cautiously. Moreover the testimony of the only eyewitness completely ruled out any possibility that the tractor was struck by the locomotive.

I think the judgment should be reversed.

A true copy
Test:

s/ EDWARD W. WADSWORTH
EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana

(SEAL)

APPENDIX B

JUDGMENT.

Extract from the Minutes of April 12, 1957.

THE TEXAS AND PACIFIC RAILWAY COMPANY,

No 16294 *versus*

MADGE REED WATKINS, Individually and as Natural Tutrix of her Minor Child, RICHARD WESLEY WATKINS.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, The Texas and Pacific Railway Company, and the Surety on the supersedeas bond herein, The Fidelity and Casualty Company of New York, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Tuttle, Circuit Judge, dissenting."

* * * * *

APPENDIX C

ORDER DENYING REHEARING

Extract from the Minutes of June 14, 1957.

THE TEXAS AND PACIFIC RAILWAY COMPANY,

No 16294 *versus*

MADGE REED WATKINS, Individually and as Natural Tutrix of her Minor Child, RICHARD WESLEY WATKINS.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Tuttle, Circuit Judge, dissenting."

* * * * *